STATE OF MICHIGAN
IN THE SUPREME COURT
On Appeal from the Michigan Court of Appeals
(Judges Mark Boonstra, Joel P. Hoekstra and Henry William Saad)

MICHAEL A. RAY AND JACQUELINE M. RAY, AS CO-CONSERVATORS OF THE ESTATE OF KERSCH RAY,

Plaintiffs,

v

Case No. 12-1337-NI
COA No. 322766
Hon. Carol Kuhnke

ERIC SWAGER,

Defendant.

PLAINTIFFS MICHAEL A. RAY'S AND JACQUELINE M. RAY'S, AS CO-CONSERVATORS OF THE ESTATE OF KERSCH RAY, REPLY TO DEFENDANT'S ANSWER TO THEIR APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

Submitted By:

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Dated: January 8, 2016

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ANALYSIS

Defendant's conduct amounted to gross negligence

Pursuant to MCL 691.1407(2)(c), a government employee such as Coach Swager is not subject to tort liability if "The officer's, employee's, member's, or volunteer's conduct does not amount to [1.] gross negligence that is [2.] the proximate cause of the injury or damage." As was stated in Plaintiff's application for leave to appeal, the Court of Appeals did not address the subject of gross negligence, having decided that defendant was not *the* proximate cause of Plaintiff's injury. In reply to Defendant's response, Plaintiff maintains and reiterates his arguments regarding proximate cause. Plaintiff writes, however, to reply to Defendant's added arguments regarding gross negligence.

Gross negligence has been defined by statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). In order to prevail on this point, defendant must show that Coach Swager did not "demonstrate a substantial lack of concern for whether an injury results" when he ordered his team to run across the street despite having a Do Not Walk signal and despite knowing that it was dark outside, that his team was not wearing reflective gear and that a car was approaching on Old US 12, where the speed limit was 45 miles per hour. Coach Swager gave his order to cross even though one of his runners had pushed the button to cycle the traffic signal. He also gave that order despite knowing that he had more than 20 people in his group and that it would take time for all of them to cross.

As Plaintiff's expert Lt. Timothy Abbo has stated in his affidavit, Coach Swager's conduct amounted to a violation of multiple statutory provisions (Exhibit T to Plaintiff's Application for

Leave to Appeal). Specifically, in ordering his team to cross Old US 12 while they were faced with a Do Not Walk signal, Swager violated MCL 257.613, which governs the obedience to traffic signals; Swager also violated MCL 257.676b, which prohibits individuals from interfering with the normal flow of traffic; finally, Lt. Abbo concluded that Swager violated multiple portions of MCL 750.136b, which prohibits acts of child abuse. Those laws exist to protect against known risks of harm, and Swager violated each of them.

Lt. Abbo concluded that Swager engaged in "Acts of recklessness and knowing disregard for a high possibility of harm." That is consistent with expert Corey Andres, who also submits an affidavit that states "Swager's conduct and/or failure to act demonstrated a substantial lack of concern for whether an injury would result to Kersch Ray." (See Exhibit U to Plaintiff's Application for Leave to Appeal.)

The conclusions of Lt. Abbo and Corey Andres reflect recent decisions by the Michigan Court of Appeals. As was discussed relative to the issue of proximate cause in Plaintiff's Application, the Michigan Court of Appeals has recently affirmed two separate Circuit Court decisions denying Defendants' Motions for Summary Disposition as it relates to Governmental Immunity. Both cases involved the alleged gross negligence of a teacher causing an injury to a student.

In the case of *White v Roseville Public Schools and Matthew Komarowski*, the Michigan Court of Appeals found that the questions of fact exist as it relates to gross negligence. In *White* (attached as Exhibit V to Plaintiff's Application for Leave to Appeal), the Plaintiff was injured when he used a table saw that was not equipped by a safety guard. The evidence demonstrated that the defendant teacher had previously demonstrated how to use the saw to his students, including Plaintiff. During those demonstrations, the Defendant did not use the saw's guard but

allegedly instructed his students to *not* emulate his technique (in contrast to Coach Swager, who instructed his students to replicate his unsafe conduct). When the Plaintiff attempted the same conduct, he cut three of his fingers.

The Court of Appeals found that reasonable jurors could conclude that Defendant's demonstration of hazardous conduct showed a "willful disregard of safety measures and a singular disregard for substantial risks", thereby amounting to "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." The trial court properly determined that the Defendant was not entitled to Summary Disposition on the issue of gross negligence.

In the present case, Defendant Swager ordered the team to run the red light at the crosswalk in violation of Michigan law. Like the defendant in *White*, Defendant Swager assisted and supervised Plaintiff in the activity that resulted in his injury. Like the defendant in *White*, Coach Swager demonstrated the very conduct that resulted in the subsequent injury.

Just as Judges Murray, Wilder and Owens concluded in *White*, reasonable minds could conclude that Coach Swager disregarded a substantial risk of harm when he ordered his team to break the law and cross a street in the dark while not wearing reflective gear and while facing a Do Not Walk sign. The danger of the situation was exacerbated because the speed limit on Old US 12 was 45 miles per hour. The speed limit not only increased the possibility of getting struck by an approaching car, but it also meant that any such collision would be catastrophic.

After considering the decision in *White*, there can be no doubt that Michigan law precludes any court from finding that Swager was not grossly negligent as a matter of law. That issue is rendered even more certain when examining the decision of the Michigan Court of Appeals in *Hurley v L'anse Creuse School District and Joe Politowicz* (Attached as Exhibit W to Plaintiff's Application for Leave to Appeal), which also upheld a trial court's denial of a Defendant's Motion

for Summary Disposition on the basis of governmental immunity.

The Court in *Hurley* upheld the denial of Summary Disposition to a gym teacher who ordered one of his students to perform sit-ups following return from a prior knee injury, causing injury. The Court in *Hurley* specifically ruled that Defendant Politowicz's decision to order Plaintiff to perform sit-ups amounted to gross negligence which was the proximate cause of the aggravation of his prior knee injury. The *Hurley* Court went on to explain and hold that the Defendant could be held responsible for the injury suffered by the Plaintiff.

In concluding that there was sufficient evidence to show that defendant was grossly negligent, the *Hurley* Court stated:

> A reasonable jury could find that Politowicz knew that Hurley had injured his knee and was unable to perform any activity that would place strain on it. It could also conclude that Politowicz ignored these restrictions and required Hurley to perform an activity that plainly required Hurley to bend his knee and place it under strain. Given the evidence that Politowicz did not even try to find an alternate activity that would be appropriate for Hurley, became upset with Hurley over his lack of participation, and then threatened him after he stopped performing sit-ups, a reasonable jury could find that Politowicz acted with a substantial disregard to the possibility that Hurley might be injured if he complied with Politowicz's directives.

Likewise, in the present case, a jury could conclude that when Coach Swager ordered his team to cross Old US 12 while a car was approaching and there was a Do Not Walk signal, he knew that there was a strong possibility that injury could result. Rather than choose an alternative course of action that would have been safer, Swager proceeded with his order. Notably, Adam Bowersox testified that "We had like a big thing with like reflective vests afterwards, make sure we wear them. And now we don't even cross that street anymore in the mornings ever, we just run circles around and stuff." (Exhibit G to Plaintiff's Application for Leave to Appeal, p 16.) Those same policies should have predated this accident.

In contesting whether he was grossly negligent in connection with the events of this case, defendant direct this Court to its opinion in *Tarlea v Crabtree*, 263 Mich App 80 (2004) and outright misstates the contents of that opinion. Defendant contends that the Court held that the defendant in that case was not grossly negligent when he "forced" the Plaintiff to run during "dangerous conditions" at a football practice. In reality, *Tarlea* clearly explains that the run in that case was not "forced" but was optional. Indeed, there were students who chose not to run. Further, there were no "dangerous conditions." The heat index on the day of the run was 67 degrees and the Plaintiff's own expert testified that there was no significant danger. To the extent there was a danger, the defendant in that case permitted the athletes who elected to participate in the option run to stop at any time to get water. *Tarlea* is filled with examples of how a serious risk of injury was not disregarded. This case is devoid of any such evidence. And, as Plaintiff argued at the summary disposition hearing, *Tarlea* reflects the value of Plaintiff's expert affidavits that remain unrebutted.

Just as defendant misrepresents the facts of *Tarlea*, he continues to diminish the role that he played in this accident. On page 35 of his brief, defendant states "I dare say that there is not a person who reads this brief who has not approached an intersection on a quiet morning and, seeing no traffic in the vicinity, crossed the street even though a traffic signal might have suggested otherwise." That observation, as the reader is aware, is not an accurate description of these events. Coach Swager did not simply personally elect to cross a street on a quiet morning after observing that no traffic was in the vicinity. Coach Swager overruled the decision of a group of children (for whom he was responsible) that elected to follow the law and ordered them to cross the street *despite seeing an approaching vehicle* on a road with a 45 mph speed limit and despite knowing that it was dark and his students were unilluminated. He gave that order as an authority figure and

as the most experience runner in the pack.

The opinions in *White* and *Hurley* were each issued within a year of the trial court's holding. They represent two of the Court of Appeals' most recent rulings relating to gross negligence in the context of governmental immunity, and they each involve instances of teachers instructing students to engage in dangerous activity. Surely, as Lt. Abbo, Corey Andres and logic all dictate, instructing students who were not wearing reflective gear to illegally cross Old US 12 in the dark while a car approached showed a substantial lack of concern for a known risk of harm. That the risk of harm was substantial is evident in the fact that a 13 year old boy was struck by a car travelling at 45 miles per hour, had a piece of his skull removed, and now suffers from dementia. That defendant's brief asserts that "As an educator, Coach Swager carefully balanced the risks and rewards of his program" only serves to demonstrate that defendant continues to fail to appreciate the importance of his role as a coach and the necessity of elevating student safety above all. Minimally, there is room for a reasonable juror to find that the gross negligence standard is met in this case.

CONCLUSION

As the trial court properly concluded, this action is filled with factual disputes that necessitate the consideration of a jury. When viewed in the light most favorable to Plaintiff, and when considering the extensive case law cited by the parties, a reasonable juror could conclude that Swager was grossly negligent on the morning that he ordered his students to disregard the law and that his act of gross negligence proximately caused Kersch Ray's catastrophic injuries. The Court of Appeals erred in concluding that reasonable minds could not differ on the question of proximate causation because the Court failed to appreciate the significance of Defendant's affirmative action relative to this accident. This case is akin to no prior case of this Court or the

Court of Appeals, and future errors by other lower courts can only be avoided by reversing the grant of summary disposition

RELIEF REQUESTED

For the reasons set forth above and in Plaintiff's Application for Leave to Appeal, Plaintiff respectfully requests that this Honorable Court peremptorily reverse the opinion of the Court of Appeals, which held that Defendant was entitled to summary disposition. Alternatively, Plaintiff requests that this Honorable Court grant this Application for Leave to Appeal and allow the parties an opportunity to fully brief and argue this issue of judicial and societal importance. Close consideration of the opinion of the Court of Appeals is particularly warranted because it is that Court's first substantive application of the decision in *Beals*, and it reveals that the *Beals* opinion is destined for misinterpretation and misapplication.

Respectfully submitted,

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Dated: January 8, 2016

Certificate of Service

The undersigned hereby certifies that on January 8, 2016, I electronically filed the foregoing paper with the Clerk of the Court using the electronic filing system which will send notification of such filing to the parties of record.

Respectfully submitted,

JOHNSON LAW, PLC

By: /s/ Christopher P. Desmond
CHRISTOPHER P. DESMOND (P71493)